Supreme Court, U. S.
FILED
JUL 27 1979
JR., CLERK

79-420

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

W. SHELLEY RICHEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

NO. _____

(Ninth Circuit No. 78-1718)

PETITION FOR CERTIORARI
TO REVIEW DECISION OF THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GAYNES & ROCKAFELLOW, P.C.
By: Alex A. Gaynes
2438 East Broadway
Tucson, Arizona 85719

Date of Original Mailing : July 26, 1979

Date of Second Mailing : August 3, 1979

Date of Final Mailing : September 12, 1979

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STATEMENT OF THE CASE

W. Shelley Richey and two other individuals, Lowell F. Johnson and Joe S. Agers, were convicted in the United States District Court for the District of Arizona on 24 counts of mail fraud in alleged violation of 18 U.S.C. §1341.

The Court of Appeals reversed the convictions. The Decision and Opinion of the Court of Appeals is annexed hereto as Exhibit 1.

Both the Government and the Defendant filed Petitions for Rehearing. Mr. Richey requested rehearing requesting that the Ninth Circuit Court decide if the evidence was sufficient to sustain a conviction in light of possible Constitutional implications under Burks v. U.S., 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

Mr. Richey's Petition for Rehearing was granted, and the Court held that the evidence was sufficient to sustain the

conviction. The Order of the Court was filed May 3, 1979. It was not, however, until June 27, 1979, that the Ninth Circuit Court denied the Government's Petition for Rehearing. The Decision denying the Government's Petition for Rehearing in the Ninth Circuit is the last pending substantive matter in front of the Ninth Circuit Court. Subsequently, the Ninth Circuit Court granted until August 3, 1979 for both sides to file Petitions for Certiorari prior to the issuance of the Ninth Circuit Mandate.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

QUESTIONS FOR REVIEW

Petitioner is raising the issue of sufficiency of evidence in a Constitutional setting in light of Burks v. U.S., 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) and U.S. v. Martin Linen Supply Co., 97 S.Ct. 1349 (1977), in light of conflicting authority in the District of Columbia Circuit. See Cephus v. U.S., 324 F.2d 893, 895; U.S. v. Watkins, 519 F.2d 294 (1975). Thus, the question presented is this: Did the Ninth Circuit err by granting a rehearing, and deciding the evidence was sufficient, without deciding whether the evidence was sufficient when the Government rested, or should this Court allow the application of the so-called "Waiver Rule", allowing review of overall sufficiency, rather than deciding specifically whether the evidence was sufficient at the end of the prosecutor's case?

ARGUMENT

The Court of Appeals for the Ninth Circuit should have decided the issue of sufficiency of the evidence at the time the Government rested, and should not have applied that old "chestnut" known as the "Waiver Rule".

In the above-entitled action, the Court of Appeals has rendered a decision in conflict with the decisions of the District of Columbia Circuit in the same issue, and has, in so doing, misconstrued the import of Burks v. U.S., 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). The question posed by this Petition should be settled by this Court, because it entails important and fundamental understanding of the double-jeopardy clause of the United States Constitution.

The Court of Appeals, in reversing the Trial Court, simply held "that the evidence was sufficient". The Court did not say that the evidence was sufficient when

the Government rested its case in chief. Failing to make a specific finding as to when the evidence became sufficient, allows the prosecution the right to attempt to prosecute W. Shelley Richey for a second time, thus violating his right to be free from double jeopardy.

While the Court below decided that the "evidence" was sufficient, the Court did not decide or enlighten counsel as to when the evidence was sufficient. Was the evidence sufficient after the Government's case? Or, was the evidence sufficient only after all the evidence in the case was presented before the Court? This allows the prosecution of Mr. Richey without deciding whether or not the Government met its burden by the time it closed its case. This issue must be decided before further prosecution can be maintained.

Perhaps the Ninth Circuit, as well as the Government, is relying on the old

chestnut known as the "Waiver Rule".

The so-called Waiver Rule has been under heavy attack, and is regarded by at least one influential writer as on its way out. 2 C. Wright, §462(a) and §463.

In the vanguard has been the District of Columbia Circuit where the rule is not to consider any later evidence in determining whether the Rule 29(a) Motion should have been granted at the close of the Government's case--regardless of when the Motion is made. Cephus v. U.S., 324 F. 2d 893, 895; U.S. v. Watkins, 519 F.2d 294 (1975).

At best, there is a severe split among the Circuits on this issue. For this reason, the Court should act in light of recent double-jeopardy cases to clear and clarify this area of law.

The traditional Ninth Circuit Waiver Rule has either been tacitly overruled, or has lost its contemporary vitality in light

of the Supreme Court's holding in Burks v. U.S., 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). While the U. S. Supreme Court did not undertake to "re-examine in detail the standards for appellate reversal on grounds of insufficient evidence", the case has a great impact on the Waiver Rule. In Burks, the defendant's Motion for Acquittal had been denied. However, the Court of Appeals reversed, on grounds that the Motion should have been granted since the evidence was insufficient. 57 L.Ed.2d at 7. The Court of Appeals remanded for a determination of acquittal or a new trial. The defendant successfully appealed on the basis of the double-jeopardy clause of the United States Constitution. In holding that once the Court found evidence insufficient, double jeopardy prevented a new trial, the Court said:

> "The double-jeopardy clause forbids a second trial for the purpose of affording the prosecution another opportunity to

supply evidence which it failed to muster in the first proceeding." 57 L.Ed.2d at 9.

". . . We have no doubt that all was correct in allowing a new trial to rectify trial error . . . " 57 L.Ed.2d at 11.

". . . In our view, it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial." 57 L.Ed.2d at 13.

> ". . . To the extent that our prior decision suggests that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled."

It is clear, then, that one cannot "waive" a double-jeopardy claim by merely making other motions. The duty of the prosecution to prove its own case without bootstrapping from the defendant's case can similarly not be waived. By forcing a defendant to choose, upon denial of his Motion

for Acquittal, either to waive the advantage of timing accruing from that point, or to waive strengthening his claim of insufficiency by putting on his own case, causes the defendant to chose which Constitutional rights he wishes to exercise, and to do so in a way that is not required by any irresolvable conflict between the rights and the particular case.

The District of Columbia rule shows that the right to actively present a defense can easily be accomodated with the right to make the prosecution prove its own case. This is particularly crucial in a complicated multi-defendant case. In the instant case, any alleged cures to the deficiencies could have been supplied by co-defendants over whom Defendant Richey had no control. The ruling of the Court of Appeals does not give Mr. Richey sufficient information to determine when the evidence was sufficient, and when it was not sufficient.

Burks strongly hints that the Waiver Rule is unconstitutional in requiring an unnecessary election between Constitutional rights. This is bolstered by the Supreme Court's opinion in U.S. v. Martin Linen Supply Co., 97 S.Ct. 1349 (1977), also a double jeopardy case. In that case, the Court determined that Rule 29 contemplated no artificial distinctions between cases were a judge entered a judgment of acquittal before the case went to the jury under Rule 29 (a), or after submission to the jury, but before a verdict was returned. The Court said that judgments under Rule 29 were to be treated uniformly. 97 S.Ct. at 1356.

Though the Court was not addressing the Waiver Rule outlined above, its remarks as to the timing questions in Martin Linen are applicable to the case at bar as well:

> "Differentiations in timing were intentionally incorporated into the rule to afford a trial judge the maximum opportunity

> to consider with care a pending acquittal motion. Insofar as the Government desires an appeal to correct error, irrational behavior, or prejudice on the part of the trial judge, its interest is not dependent on the point of trial when the judge enters his Rule 29 judgment, and suffers no special prejudice by a judge's acquittal after the jury disagrees and is discharged. And to the extent that the judge's authority under Rule 29 is designed to provide additional protection to a defendant by filtering out deficient prosecutions, that defendant's interest in such protection is essentially identical both before the jury is allowed to come to a verdict and after the jury is unable to reach a verdict . . . " 97 S.Ct. at 1356.

A prosecution's burden should not be altered by a defendant's decision either to stand on his Rule 29(a) Motion or go forward with an active defense. Know that the choice to go on will enable the prosecution to "take another shot" through rebuttal.

It is the denial of the right to a fair trial where mere procedural questions of timing are determinative of so substantial

a right as the right to remain silent and make the Government prove its case and the right to offer an active defense.

For these reasons, the Court should undertake review and protect Mr. Richey from a denial of his Constitutional rights.

As a matter of law, the evidence at trial was insufficient, no matter when it was reviewed. The Court of Appeals' ruling leaves open the opportunity of the Government to try W. Shelley Richey a second time for alleged violations of the law which he did not commit.

The Ninth Circuit disregarded its own cases in finding the evidence sufficient. The Ninth Circuit disregarded the cases of U.S. v. Piepgrass, 425 F.2d 194 (9th Cir., 1970); Windsor v. U.S., 384 F.2d 535 (9th Cir., 1967); and the unpublished opinions of U.S. v. Hetrick, Franklin, Ely, Lewkowitz, Nos. 77-2798, 2799, 2966, 2880, 2953 (9th Cir., Dec. 11, 1978).

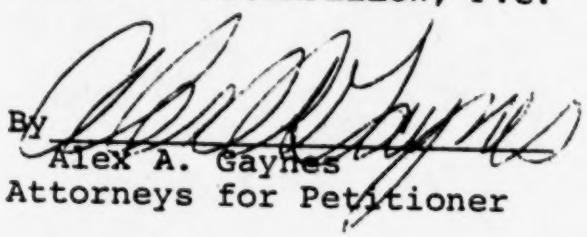
The issue of sufficiency has been raised at every level of proceedings.

Mr. Richey's license to practice law was taken from him, and he has been forced to expend huge sums of money for his own defense, while at the same time, he was unable to earn a living at his livelihood. The proceedings have placed incalculable burdens upon Mr. Richey. The psychological burdens are no less real than the financial.

To require W. Shelley Richey to face a second complicated Federal trial when the evidence was insufficient after all the evidence was in, and clearly insufficient at the end of the Government's case, would be a grave miscarriage of justice. At the very least, this Court should remand this matter, requiring the Ninth Circuit to decide when the evidence was sufficient or when it was not sufficient. This would protect Mr. Richey from a second trial if the evidence is truly insufficient.

Respectfully submitted this 25th day of July, 1979.

GAYNES & ROCKAFELLOW, P.C.

By 
Alex A. Gaynes
Attorneys for Petitioner

AFFIDAVIT OF SERVICE

STATE OF ARIZONA)
: ss.
COUNTY OF PIMA)

ALEX A. GAYNES, being first duly sworn upon his oath deposes and says:

That he is the attorney for the Appellant Richey herein;

That, as such, he has caused to be mailed and/or delivered, two (2) copies of Appellant Richey's Petition for Certiorari to Review Decision of the United States Court of Appeals for the Ninth Circuit to each of the following persons on the 12 day of September, 1979:

William G. Walker
Post Office Box 3017
Tucson, Arizona 85702
Attorney for Appellant Agers

Ralph E. Seefeldt
Suite 913
177 North Church Avenue
Tucson, Arizona 85701
Attorney for Appellant Johnson

Solicitor General of the
United States
Department of Justice
Washington, D. C. 20530

FURTHER AFFIANT SAYETH NOT.

ALEX A. GAYNES

SUBSCRIBED AND SWORN to before me

this 12 day of September, 1979.

Notary Public

My Commission Expires:
3-29-83

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. LOWELL F. JOHNSON, Defendant-Appellant,	No. 78-1656
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JOE S. AGERS, Defendant-Appellant.	No. 78-1696
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. W. SHELLEY RICHEY, Defendant-Appellant.	No. 78-1718 OPINION

Appeal from the United States District Court for the District of Arizona

Before: MERRILL and CHOY, Circuit Judges, and BONSAL*, District Judge.

- Exhibit 1 -

* The Honorable Dudley B. Bonsal, Senior U.S. District Judge, for the Southern District of New York, sitting by designation.

CHOY, Circuit Judge:

Johnson, Agers, and Richey appeal from their convictions for mail fraud in violation of 18 U.S.C. § 1341. We reverse and remand.

I. Statement of the Case

On September 8, 1977, a federal grand jury indicted appellants Johnson, Agers, and Richey, and two others, for mail fraud. Each appellant pleaded not guilty. At trial the Government sought to prove that the men had been involved in an elaborate land sale fraud involving Thunderbird Valley corporation, of which appellants were major stockholders, and other corporations controlled by one or more of the appellants. The Government maintained that Thunderbird Valley, through another corporation controlled by one of appellants, assigned spurious mortgages to third parties. It

also used the same lots as security on two or more instruments without telling the creditors of other claims against the lots. At the same time, Thunderbird Valley itself paid assignees on some mortgages that were either spurious or upon which the mortgagor had defaulted, in order to encourage confidence in Thunderbird Valley operations. The Government also sought to show other similar fraudulent activities.

A jury found appellants guilty of all 24 counts of mail fraud charged. Each count represented a check mailed to an assignee of a spurious or defaulted mortgage. Each appellant was sentenced to four years in prison and fined $1000 on each count, with the prison sentences to run concurrently and the fines to be consecutive, thus totaling $24,000.

II. Foundation Requirements under Rule 1006

A. Requirement of Admissibility

In the court below appellants maintained that they were unaware of any improprieties. In particular, appellant contended that the 16 instances of double assignment revealed in the Government's case-in-chief were inadvertent. Mindful of this defense, the Assistant United States Attorney noted:

> The main thrust of the rebuttal is that these gentlemen indicate that there was perhaps a few inadvertent double assignments. We are also prepared to offer other testimony through Mr. Harbert that there were a great number of such double mortgages and assignments to the point where it was beyond inadvertence.

Later, the Government began to question Mr. Harbert, a postal inspector, about a summary he had made of records seized from the offices of the Thunderbird Valley corporation. This summary purported to establish that Mr. Harbert found 80 double

assignments out of 260 files of transactions perused. When this questioning began, defense counsel[1]/ immediately objected:

> MR. GAYNES (Counsel for Richey): Your Honor, I'm going to object to this witness testifying about a box of information he got without showing there was any kind of business records of this corporation.
>
> THE COURT: Yes, I think so.
>
> MR. COVINGTON (Assistant U.S. Attorney): Your Honor, we've had this information available to the defense for some time.
>
> THE COURT: It don't make any difference. There has to be something in evidence from which the lawyers are in a position to cross examine the witness on.
>
> MR. COVINGTON: We're basing this on Rule 1,006 of the Federal Rules of Evidence on summary witnesses.
>
> THE COURT: But it does relate to matters that are not in evidence.
>
> MR. COVINGTON: I think that's the import of the Rule 1,006.
>
> THE COURT: Yes.

The Government then observed that it had sent defense counsel notice of its intent

to use summaries. The court ascertained that counsel for each defendant had received that notice. Then the following colliquy took place:

> MR. GAYNES: . . . . My objection is based on the fact that the exhibits of what you're making summaries out of, you have to have some kind of foundation as to the trustworthiness of the documents, somehow, that they're business-related or business records and then you can make summaries of properly foundation -- if you show a proper foundation as to business records. We don't know whether these business records --
>
> THE COURT: You had an opportunity to look. That's the problem, though, and evidently you didn't. You didn't care to.

The district court erred in not requiring the proponent of the summary to establish a foundation. It was incorrect to suggest that the opponents had the burden of determining that a foundation was lacking.

The Government invoked Fed.R.Evid. 1006,[2/] which provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

We hold that under this Rule the proponent of the summary must establish that the underlying materials upon which the summary is based are admissible in evidence.

The purpose of Rule 1006 is to allow the use of summaries when the volume of documents being summarized is so large as to make their use impractical or impossible; summaries may also prove more meaningful to the judge and jury. See Note of Advisory Committee on Proposed Rules, reprinted in 28 U.S.C.A. Federal Rules of Evidence at 783; S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 694 (2d ed. 1977); 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1006[02] (1975). Such a rationale imports

that instead of using a summary, the proponent of the summary could introduce the underlying documents upon which the summary is based. See United States v. Smythe, 556 F.2d 1179, 1184 & n.11 (5th Cir.), cert. denied, 434 U.S. 862 (1977).

Moreover, requiring the proponent to show the admissibility of the underlying materials is necessary to protect the integrity of the Federal Rules. In the instant case, the Government argued that notification of opposing counsel obviated the need to show that the underlying materials fell within an exception to the hearsay rule. We do not believe that Congress intended that counsel could abrogate other restrictions on admissibility--like the hearsay rule--by the use of summeries; we cannot read Rule 1006 as preempting the other Rules.

Finally, Congress placed Rule 1006 not in the Article of the Federal Rules

dealing with exceptions to the hearsay rule, Article VIII, but rather in the Article dealing with "Contents of Writings, Recordings and Photographs," Article X. While the Government argues that this Article X Rule abrogates the hearsay limitations of Article VIII, the Article X provisions more properly deal with the "best evidence" problems arising from the use of materials other than originals. See Fed.R.Evid. 1002. And when Congress intended to provide an exception to the hearsay rule for materials which it also exempted from the best evidence rule in Article X, it did so by a provision in Article VIII. For example, Rule 1005 provides that public records may be provenwith other than the original under some circumstances. Rule 803(8), (9), (10), however, provide the hearsay exception for various types of public records. Similarly, Rule 1007 allows the use of secondary

materials to prove the contents of testimony or a written admission of a party. But Rule 801(2) provides that admissions are not subject to the hearsay rule. In claiming that Rule 1006 provides an exception from both the best evidence rule for the underlying materials, the Government (and the district court) misapprehended this congressional scheme.

Commentators and other courts have agreed that Rule 1006 requires that the proponent of a summary establish that the underlying documents are admissible in evidence. For example, Judge Weinstein and Professor Berger write:

> Before the chart, summary, or calculation may be admitted, it is necessary for the party offering the exhibit to lay a proper foundation for the admission of the original or duplicate materials on which the exhibit is based, or for the parties to stipulate to the admissibility of the materials. Charts, summaries, or calculations, are admissible as evidence if, for any reason, the original or

> duplicate materials on which they are based are inadmissible. Thus, if the original materials contain hearsay and fail to qualify as admissible evidence under one of the exceptions to the hearsay rule, the chart, summary, or calculation based on that material is admissible.

5 Weinstein on Evidence § 1006[03], at 1006-5 to 1006-6 (footnotes omitted)[3]; see 2 Jones on Evidence §7:30 (Gard rev. 1972); Federal Rules of Evidence Manual 196 (1978 supp.).[4]

Similarly both the Second Circuit and the Fifth Circuit have concluded that Rule 1006 requires that the proponent establish the admissibility of the underlying materials. See Smyth, 556 F.2d at 1184 & n.11[5]; United States v. Conlin, 551 F.2d 534, 538 (2d Cir.), cert. denied, 434 U.S. 831 (1977)[6]; but cf. Case & Co., Inc. v. Board of Trade, 523 F.2d 355, 361 (7th Cir. 1975) (semble) (in determining motion for summary judgment prior to effective date of Rule 1006, summary admissible when underlying

documents made available to opposing party; court refers to Rule 1006).

We conclude that the proponent of a summary must demonstrate the admissibility of the underlying writings or records summarized, as a condition precedent to introduction of the summary into evidence under Rule 1006.[7/]

B. Existence of Adequate Foundation

The Government argues that even if the proponent of a summary must demonstrate that the underlying materials are admissible, such a requirement was met here; thus the district court's failure to articulate such a requirement was harmless error.

The Government argues first that "if the records viewed are identified as being in the general control of the defendant, the normal foundation for business records is not necessary." The Government appears to be arguing that such records would constitute admissions excluded from the hearsay rule by Fed.R.Evid. 801(d)(2).

Assuming arguendo that such records would constitute admissions, the testimony relied upon by the Government does not show that the records were "in the general control" of any of the applicants. At best that testimony established that the files of the 260 transactions had been taken from the offices of Thunderbird Valley and one witness referred to them as "corporate records." This testimony also does not demonstrate that the documents fell within the business record exception to the hearsay rule. See Fed.R.Evid. 803(6).[8/]

C. Conclusion

We conclude that the district court improperly allowed the Government to ask Mr. Harbert about the summary involving the 80 double assignments.[9/] Having carefully reviewed the record as a whole, we cannot agree with the Government that the testimony about the summary was so unimportant as to

make its improper admission a harmless error. See Fed.R.Crim.P. 52(a).

Accordingly, appellants' convictions are REVERSED and the cases REMANDED.[10]/

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. LOWELL F. JOHNSON, Defendant-Appellant,	]	No. 78-1656
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JOE S. AGERS, Defendant-Appellant.	]	No. 78-1696
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. W. SHELLEY RICHEY, Defendant-Appellant.	]	No. 78-1718 ORDER

Before: MERRILL and CHOY, Circuit Judges, and BONSAL,* District Judge.

We grant appellants Richey's and Agers' petitions for rehearing, praying that

we determine if the evidence was sufficient to sustain their convictions in light of the possible constitutional implications under Burks v. United States, 98 S.Ct. 2141 (1978).

We hold that the evidence was sufficient to sustain their convictions. See United States v. Jones, No. 78-2267 (9th Cir. Jan. 29, 1979).

*The Honorable Dudley B. Bonsal, Senior U.S. District Judge, for the Southern District of New York, sitting by designation.

FILED
July 19, 1979

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. LOWELL F. JOHNSON, Defendant-Appellant.	No. 78-1656
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JOE S. AGERS, Defendant-Appellant.	No. 78-1696
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. W. SHELLEY RICHEY, Defendant-Appellant.	No. 78-1718 ORDER

Before: MERRILL and CHOY, Circuit Judges and BONSAL,* District Judge.

Both the Government and Appellant Richey have made motions for stay of mandate

pending their respective applications to the Supreme Court of writs of certiorari. The motions are granted.

The issuance of the mandate of this court in the above entitled cases is stayed to and including August 3, 1979. If the applications for writs of certiorari are made within that period, the mandate shall continue to be stayed until disposition by the Supreme Court of the applications, and then if the Court grants either application, until the Court disposes of the case or cases.

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*The Honorable Dudley B. Bonsal, Senior United States District Judge for the Southern District of New York, sitting by designation.

Footnotes

1. (reference on page 5)

Shortly before the objection at issue here, the trial judge stated: "I thought I said, but if I didn't, all objections by any one (defense) counsel inure to the benefit of all."

2. (reference on page 6)

Although the Government invokes Rule 1006, it did not introduce the summary into evidence. Rather it had Mr. Harbert testify about the summary. We discuss today whether the use of the summary violated the hearsay limitations of the Federal Rules of Evidence, the issue raised by appellant below. Because this case may be retries, we note that having a witness testify about the contents of a writing--i.e., the summary--may also implicate the best evidence rule. See Fed.R.Evid. 1002.

3. (reference on page 11)

The Government contends that the "foundation according to Wigmore seems to be . . . that the records come from the particular business and are available for inspection," citing 4 Wigmore on Evidence § 1230. Weinstein and Berger, however, more persuasively read Wigmore as supporting the rule they state in the first sentence we have quoted above.

In support of their reading of Wigmore, the Government refers to a decision cited by Wigmore, State v. Olson, 75 Utah 583, 287 Pac. 181 (1930), which the Government reads as not requiring demonstration that the underlying materials are admissible. The Government does not, however, discuss the Ninth Circuit decisions to which Wigmore refers. For example, Wigmore cites Wilkes v. United States, 80 F.2d 285, 291 (9th Cir. 1935). In that case this court held that the admission of a summary was reversible error when the underlying materials "were not admitted or admissible against" the defendants against whom they were introduced. Id. at 291. Significantly, Weinstein and Berger read Wilkes as supporting their second sentence we quoted above.

4. (reference on page 11)

The commentators suggest that the relaxation of the hearsay rule as to expert testimony under Fed.R.Evid. 703 may also lessen the foundation requirement for a summary prepared and used by an expert under Rule 1006. Because in the instant case Mr. Harbert was not qualified as an expert, we need not address this question.

5. (reference on page 11)

In Gordon v. United States, 438 F.2d 858, 876 (5th Cir.), cert. denied, 404 U.S. 828 (1971), decided prior to the effective date of the Federal Rules of Evidence, the Fifth Circuit wrote:

When summaries are used, therefore, the court must ascertain with certainty that they are based upon and fairly represent competent evidence already before the jury.

Id. at 876. The Court added:

> (T)he jury should be instructed that the summaries do not, of themselves, constitute evidence in the case but only purport to summarize the documented and detailed evidence already admitted . . . .

Id. at 877. In EAC Credit Corp. v. King, 507 F.2d 1232 (5th Cir. 1975), the Fifth Circuit approved the use of a summary when the underlying documents had originally been offered in evidence but had been withdrawn, citing proposed Rule 1006. The court did not explicitly state whether or not the underlying documents had to be admissible.

In United States v. Smyth, 556 F.2d 1179 (5th Cir.) cert. denied, 434 U.S. 862 (1977), the Fifth Circuit wrote:

> The court could have excluded all of the underlying documents and received the summaries as evidence. The court chose, however, to admit these documents in evidence and to instruct the jury that the summaries were not evidence.

Id. at 1184. In a footnote the court added:

> Implicit in Rule 1006 is the notion that a trial judge may choose this alternative. In the circumstances of a given case the court may feel that the jury, or the court, . . . ought to consider the source documents resolving a fact issue.

Id. at 1184 n.11. Thus the Fifth Circuit dispproved the statements in Gordon that the underlying materials must be in evidence and that the summaries cannot themselves be evidence. At the same time, by indicating that the trial judge had discretion to choose between the summaries or the underlying documents, the Fifth Circuit implied that the underlying documents had to be admissible. We embrace the same rule today.

6. (reference on page 11)

The Second Circuit quoted the following language from the Fifth Circuit's Gordon decision, see note 6 supra:

> (W)hen summaries are used. . . the court must ascertain with certainty that they are based upon and fairly represent competent evidence already before the jury

551 F.2d at 538. The Second Circuit thus apparently required that the underlying materials be both admissible and admitted. As discussed in note 6 supra, the Fifth Circuit no longer adheres to that portion of Gordon requiring that the underlying materials be in evidence. We agree with the Fifth Circuit and hold that the underlying materials must be admissible, but need not be admitted in every case. As the Fifth Circuit noted, there may be times when the district court will, in its discretion, insist that the underlying materials rather than summaries be introduced. 556 F.2d at 1184; see note 6 supra. On other occasions, however, the district court may well with its discretion conclude that the formal step of introducing into evidence the underlying documents is not necessary to satisfy the foundation requirement.

See note 6 supra. Additionally, we have difficulty reconciling an absolute requirement of admission with the last sentence of Rule 1006 providing that ordering the materials to be produced in the court at all is discretionary with the trial judge.

7. (reference on page 12)

See note 5 supra.

8. (reference on page 13)

The Government argues that Mr. Harbert's rebuttal testimony was relevant to refute appellants' claim that the double assignments were inadvertent. But relevancy is not the only limitation upon admissibility under the Federal Rules. In this case the Government improperly failed to overcome the obstacle imposed by the hearsay rule. See Fed. R. Evid. 402 802.

9. (reference on page 13)

See note 2 supra.

10. (reference on page 14)

Accordingly, we do not consider appellants' other assignments of error.